Supreme Court, U.S.
FILED

99176 6 MAY 4 2000

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CARL UNDERWOOD and
DELORES UNDERWOOD,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

Is the profit motive properly determined at the partnership level or individual level, for purposes of allowing investment loss deductions under 26 U.S.C.A. Section 183.

PARTIES TO THE PROCEEDING

The parties consist of the Petitioners and the Respondent, the Commissioner of Internal Revenue.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is included in the Appendix at Appendix A at 1a-3a. The Opinion of The United States Tax Court dated December 14, 1998 is published at T.C. No. 1356-89 and is included in Appendix B at 4a. The Opinion of The United States Tax Court dated December 16, 1998 is published at T.C. No. 1356-89, and is included in Appendix C at 6a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued the Opinion on February 4, 2000. This Petition for Writ of Certiorari is filed within ninety (90) days of Circuit Court decision. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

26 U.S.C.A §183

STATEMENT OF THE CASE

Petitioners are members of a partnership that invested certain funds in oil exploration and production. The Internal Revenue Service disallowed certain losses. In so doing the interpretation of 26 U.S.C.A. §183 was applied. The Internal Revenue Service determined profit motive based on the partnership level and not at the individual level for purposes of allowing loss deductions. Petitioners contend the proper determination should be at the individual level and not at the partnership level.

ARGUMENT FOR GRANTING WRIT

The Petitioners assert the Tax Court and Circuit Court's findings that the profit motive be determined at the partnership level, was in error and such findings do not follow the clear statutory language of Internal Revenue Code (IRC) Section 183 and the regulations thereunder.

IRC Section 183 provides in part:

> "In the case of an activity engaged in by an individual or an S corporation, if such activity is not engaged in for profit, no deduction attributable to such activity shall be allowed.."

The statute itself clearly states "an activity engaged in by an individual." The language of the statute directs that an individual engages in an activity.

IRC Regulation Section 1.183-1 provides in part:

> "Section 183 provides rules relating to the allowances of deductions in the case of activities (whether active or passive in character) not engaged in for profit by individuals .."

The language of the regulation clearly indicates that "active or passive activities..by individuals.." are the basis for the application of the statutes.

Finally, IRC Regulation Section 1.183-2 provides in part:

> "The determination of whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and circumstances of each case. Although a reasonable expectation of profit is not required, the facts and circumstances must indicate that the taxpayer entered into the activity, or continued the activity, with the objectives or making a profit...Thus it may be found that an investor in a wildcat oil well who incurs very substantial expenditures is in the venture for profit even though the expectation of profit might be considered unreasonable.."

The language of the regulation clearly indicates that "the taxpayer entered into the activity, or continued the activity, with the objectives of making a profit." The clear language of the statutes states it is the taxpayers' objective, not that of the activity. The example in the regulation cited is directly on point, as a wild cat venture (or activity) is determined by the investors objectives and not that of the activity, itself.

CONCLUSION

The Court of Appeals decision in this case fails to follow the clear intent of 26 U.S.C.A. §183. Accordingly, this Court should grant the Petition for Writ of Certiorari to correct the misapplication of said statute.

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed February 4, 2000]

Nos. 99-9015 & 99-9016
(T.C. Nos. 1356-89 & 37159-86)

CARL D. UNDERWOOD;
DOLORES A. UNDERWOOD,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

ORDER AND JUDGMENT*

Before **EBEL**, **KELLY**, and **BRISCOE**, Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In these consolidated cases, petitioners appeal from the Tax Court's decision that they owed deficiencies for the taxable years 1979, 1981 and 1982. The deficiency determinations were based on the Commissioner's disallowance of deductions claimed by petitioners arising out of investments in oil and gas limited partnerships.

On review, petitioners present one argument: the Tax Court erred in finding that the profit motive is properly determined at the partnership level. They maintain that the individual partner's profit motive is the relevant inquiry under 26 U.S.C. § 183 and the applicable regulations.

We review this legal question of statutory interpretation *de novo*. *See True Oil Co. v. Commissioner,* 170 F.3d 1294, 1298 (10th Cir. 1999). We have held that in determining whether activities were engaged in for profit for purposes of 26 U.S.C. § 183, "we look to the economic motive of the partnership, not the individual investor." *Hildebrand v. Commissioner,* 28 F.3d 1024, 1027 (10th Cir. 1994) (citing *Cannon v. Commissioner,* 949 F.2d 345, 349 (10th Cir. 1991)). This panel cannot overturn the decision of another panel of this court. *See United States v. Nichols,* 169 F.3d 1255, 1261 (10th Cir.), *cert. denied* 120 S. Ct. 336 (1999). Consequently, petitioners' argument against established law in this circuit must fail. The petition for review of the Tax Court's decision is DENIED.

Entered for the Court

/s/_____
Mary Beck Briscoe
Circuit Judge

APPENDIX B

UNITED STATES TAX COURT
WASHINGTON, DC 20217

[Filed December 14, 1998]

No. 1356-89

CARL D. AND DOLORES A. UNDERWOOD, *Petitioner,*	)
v.	)
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	)

ORDER AND DECISION

This case was called from the calendar for the Special Session of the Court at Los Angeles, California on November 17, 1998, for hearing on the Court's Order to Show Cause, dated August 20, 1998. There was no appearance by or on behalf of petitioners, however, the Court had before it petitioners' status report, filed November 10, 1998. Counsel for respondent appeared and reported to the Court on the status of this case. Upon due consideration, and for cause more fully appearing in the transcript of the proceeding, it is

ORDERED that the Court's Order to Show Cause, dated August 20, 1998, is hereby made absolute. It is further

ORDERED and DECIDED that there is a deficiency in income tax due from the petitioners in this case for the taxable year 1979 in the amount of $43,694.00.

/s/ Stephen J. Swift
Judge

ENTERED: December 14, 1998

APPENDIX C

UNITED STATES TAX COURT
WASHINGTON, DC 20217

[Filed December 16, 1998]

No. 1356-89

CARL D. AND DOLORES A. UNDERWOOD,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER AND DECISION

This case was called from the calendar for the Special Session of the Court at Los Angeles, California on November 17, 1998, for hearing on the Court's Order to Show Cause, dated July 28, 1998. There was no appearance by or on behalf of petitioners, however, the Court had before it petitioners' status report, filed November 10, 1998, in which petitioners attempt to distinguish the issues in their case from the issues in Krause v. Commissioner, 99 T.C. 132 (1992), affd. sub nom. Hildebrand v. Commissioner, 28 F.3d 1024 (10th Cir. 1994). Counsel for respondent appeared and was

heard. Upon due consideration of petitioners' failure to distinguish this case from the Krause case, and for cause more fully appearing in the transcript of the proceeding, it is

ORDERED that the Court's Order to Show Cause, dated July 28, 1998, is hereby made absolute. It is further

ORDERED and DECIDED that there are due from the petitioners in this case deficiencies in income taxes for the taxable years 1981 and 1982 in the amounts of $92,843.17 and $81,845.00, respectively, and there are no additions to tax due under Internal Revenue Code Sections 6653(a)(1), 6653(a)(2), and 6659.

All of the deficiencies in income taxes as set forth above constitute substantial underpayments attributable to tax motivated transactions within the meaning of Internal Revenue Code Section 6621(c), formerly Section 6621(d).

/s/ Stephen J. Swift

Judge

ENTERED: DEC 16 1998